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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 739

EARL T. ELLIS,
Receiver of
THE QUANTICO COMPANY, INCORPORATED,
Petitioner,

vs.

CLIFTON B. CATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Earl T. Ellis, Receiver of The Quantico Company, Incorporated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled cause on December 20, 1949, affirming the judgment of the United States District Court for the Eastern District of Virginia.

JURISDICTION

The judgment of the Court of Appeals below was entered on December 20, 1949 (R. 39), and its order denying petition for a rehearing was entered on January 28, 1950 (R. 39). Jurisdiction of this Court to review that judgment on certiorari is invoked under 28 United States Code, section 1254 (1).

QUESTIONS PRESENTED

The questions presented for determination are:

1. Whether or not a district court of the United States, sitting in diversity of citizenship cases, after hearing plaintiff's motion for summary judgment in his favor, together with individual affidavits and annexed documents in support thereof, with a copy thereof served upon the defendant under Rule 56 of the Federal Rules of Civil Procedure, where no counter-affidavit was filed by the defendant in opposition thereto as provided by the Rule (e), may lawfully deny such motion for summary judgment, without assigning grounds therefor, and adjudge that the plaintiff was not entitled to recover possession of the lands sued for, and dismiss his action with costs to the defendant, in the absence of any motion therefor?

2. Whether or not such district court, when sitting in diversity of citizenship cases and invoking Rule 56 of the Federal Rules of Civil Procedure, may lawfully refuse to apply the law of the State in which it sits, whether declared by its Legislature in a statute or by its highest court in a decision in like cases, as an aid in determining the questions presented by a motion of a party for summary judgment in his favor?

3. Whether or not a circuit court of appeals of the United States, sitting in cases like those described in the preceding questions (1) and (2), may lawfully sanction the denial of such motion and refusal to apply such law, and then affirm the judgment of the district court therein?

4. Whether or not a circuit court of appeals of the United States, while sitting on appeal in such cases, may lawfully ignore the record as made by the parties in the cases in the lower court, ignore the procedure as prescribed by Rule 56 of the Federal Rules of Civil Procedure, invoke the doctrine of judicial notice in such cases, ignore the rule of estoppel as between landlord and tenant, vendor and vendee, in actions of ejectment, supply facts and statutes found in other cases involving other parties, base its opinion and judgment upon *its assertion* that an appeal had been taken from a summary judgment in favor of the defendant, where the notice of appeal and record showed the contrary fact, and then affirm the judgment against the plaintiff in the lower court?

5. Does the record show that the petitioner was entitled to a summary judgment as a matter of law in the District Court?

FEDERAL RULE INVOLVED

The relevant parts of Rule 56 of the Federal Rules of Civil Procedure are as follows:

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) * * *.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) * * *.

(e) *Form of Affidavits; Further Testimony.* Supporting affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner on October 4, 1947, succeeded H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated, who were appointed on April 8, 1931, by the Hustings Court of the City of Petersburg, Virginia, to take charge of a certain 1900 acres of land owned by that Company at the time of its dissolution on May 31, 1919. The land lies within the area occupied by the United States Marine Corps post at Quantico, Virginia. On May 6, 1918, that Company, responding to the request of United States Senator Swanson, submitted to the United States a written

offer to sell and convey its said lands to the latter for a consideration of $375,000.00 (R. 19-20). A like offer was submitted by Hugh B. Hulchman to sell his lands for $100,000.00 (R. 19-20). These two offers were introduced in evidence before a subcommittee of the Committee on Naval Affairs, United States Senate, of which Senator Swanson was chairman, at its hearing on May 6, 1918, on the subject of the purchase of land for Marine Barracks, Quantico, Virginia. Both of them were accepted by the Congress, on behalf of the United States, by its Act of July 1, 1918, ch. 114, 40 Stat. 704, at page 724 thereof, the provisions of which are set forth in the record (R. 8). This Act directed the President to acquire the title to this land for the United States and to make payment therefor, out of the sum of $475,000 thereby appropriated for that purpose. This contract of purchase has never been completed by any President of the United States.

On said July 1, 1918, that Company and the United States entered into a contract of lease (drafted by the Navy Solicitor) covering a portion of said land, at a stipulated rental of $18,000.00 per year, to run from that date until June 30, 1919, *or until such time as the United States takes possession of said land under authority of and with a view to the purchase thereof* (R. 18). The United States Marine Corps then occupied said leased land, and since July 31, 1946, has been in such occupancy without legal right (R. 5-6). On November 11, 1918, that Marine Corps occupied the *unleased* land of said Company, without its permission, and is now in possession thereof without legal right (R. 6).

This contract of lease was never terminated by the parties thereto by consent or agreement (R. 6). H. B. Gilliam and C. E. Ellis, as Receivers of said Company, by their notice in writing dated June 24, 1946, served upon

the President of the United States on June 25, 1946, terminated said lease for non-payment of rent, to take effect on July 31, 1946 (R. 17-18). On October 7, 1947, the respondent, Clifton B. Cates, entered upon said land and exercised acts of dominion thereover, without the consent of petitioner. On December 18, 1947, petitioner, as a citizen of the State of Virginia, sued the respondent, as a citizen of the State of Tennessee, in the United States District Court for the Eastern District of Virginia, Alexandria Division, to recover possession of said 1900-acres of land (R. 1-3). Respondent's answer to the complaint *admitted* that The Quantico Company, Incorporated, on July 1, 1918, was the owner in fee and entitled to the possession of the lands described in the complaint, but denied that the petitioner was such owner and entitled to such possession on October 6, 1947; *admitted* that said Company sold and the United States purchased said lands; *admitted* that they were occupied for a short time by the United States under a lease dated July 1, 1918; and *admitted* that the respondent had no title or interest in said property (R. 3-5). That answer then alleged, as a defense, that the United States was the owner of the lands in fee simple; that such title was acquired by the United States by virtue of a decree dated January 17, 1933, entered by said District Court below in a suit entitled United States of America v. H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated, Equity No. 33 (R. 4-5). *No record of such proceeding, nor any decree therein, was pleaded in the answer of the respondent in this action.* And such record is not included in the record now before this Court.

On September 3, 1948, petitioner filed in that action and served a written request upon the respondent to admit, within 15 days thereafter, the truth of the matters of fact set forth in the request, pursuant to Rule 36 of the Federal

Rules (R. 5-7). *No answer or response to this request was made by the respondent.* Such matters of fact, by reason of such default, stand admitted under that Rule of Court. They establish the facts already set out herein and other facts to wit: The United States Marine Corps entered into possession and occupied on July 1, 1918, the land owned and leased by the Quantico Company, to the United States on July 1, 1918, and continued in possession thereof at all times thereafter; the United States paid to said Company the sum of $6,000.00 as the contract-rent for said leased land for the months of July, August, September and October, 1918; it paid the sum of $269,477.00 to said Company and its Trustee in Bankruptcy on September 4, 1919, and nothing thereafter; it has never received from said Company any deed of conveyance of the land described in the complaint; it expressed no intention to terminate said lease at any time; the respondent Cates has no right, title, or interest in said land; his authority for entering upon that property on October 7, 1947, and exercising control thereover until the commencement of this action on December 18, 1947, is founded upon an order in writing received by him from the United States (R. 6).

On October 12, 1948, petitioner filed in that action a motion for summary judgment in his favor, with affidavits and annexed documents in support thereof, and served a copy thereof upon the respondent, pursuant to Rule 56 of the Federal Rules of Civil Procedure (R. 7-20). *No counter-affidavits were filed by respondent in opposition to the motion.* On June 3, 1949, petitioner filed therein a motion to strike from the record a motion of respondent, filed May 18, 1949, for summary judgment in his favor (R. 23-24). These two motions of petitioner, *and none by the respondent,* were argued and submitted to the District Court below (Judge Don Gilliam sitting specially) at its hearing on

June 6, 1949, as appears by docket entry of the Clerk of the Court (R. 33). That Court delayed decision for a period of 40 days.

On July 16, 1949, a memorandum opinion, bearing the signature of the trial Judge, was filed in the action in the District Court below. *That opinion,* covering eight printed pages of matter, *was exclusively devoted to a discussion of a motion* which was *not argued by counsel or submitted to that Court at its hearing on June 6, 1949, namely, motion of the respondent for summary judgment in his favor* (R. 25-31). On July 20, 1949, that Court entered a judgment denying petitioner's motion for summary judgment, adjudging that he was not entitled to recover possession of the lands described in the complaint, failing to grant relief to respondent, and dismissing the action with costs awarded to the respondent (R. 31-32). On December 20, 1949, the Circuit Court of Appeals for the Fourth Circuit, sitting in the case on appeal, rendered an opinion in writing affirming the judgment of the District Court below (R. 33-38). Its judgment of affirmance was entered December 20, 1949 (R. 39). The gross errors and flagrant irregularities in that opinion may be summarized as follows:

That Court overlooked or disregarded the record, save in one instance, as made by the parties and presented to that Court for review; it erred in the first sentence in that opinion by asserting that "This is an appeal from a summary judgment for defendant in an action by the Receiver of the Quantico Company against Clifton B. Cates, Commanding General of the Marine Corps Base at Quantico, Virginia" (R. 33). That Court overlooked Rule 56 (c) of the Federal Rules of Civil Procedure, and made no mention of it; it ignored the four questions submitted by the petitioner to that Court for adjudication, the first question being: "Whether the pleadings, admissions on file, together

with the affidavits and written documents attached thereto, show that there is no genuine issue as to any material fact and that the plaintiff as the moving party is entitled to a judgment as a matter of law?" And the second question being: "Whether a trial Court, after hearing the plaintiff's motion for summary judgment in his favor, together with the pleadings, admissions on file, and affidavits in support thereof, there being no counter-affidavits for the defendant, has the power and jurisdiction to dismiss the action, with costs to the defendant, in the absence of any motion therefor?" And the third question being: "Whether a trial Court has the power and jurisdiction to conclude that a defendant is entitled to a summary judgment as a matter of law, in the absence of any motion therefor?" That Court, in its opinion, overlooked or disregarded the record showing the action to be a diversity of citizenship case, and the mandate of this Court in Erie R. Co. v. Thompkins, 304 U. S. 64, and Ruhlin v N. Y. Life Insurance Co, ante, p. 202, requiring the Federal Courts to search for and apply the entire body of substantive law governing an identical action in the State Courts. That Court overlooked or disregarded 9 decisions of the highest court in the State of Virginia, including Emerick v. Tavener, 9 Gratt. 220, 223-224, and Suttle v. R. F. & P. R. Co., 76 Va. 284, 289, relating to actions of ejectment in Virginia, all cited in the brief for the appellant therein. That Court overlooked or disregarded 27 decisions of this Court, including Chavez v. Bergere, 231 U. S. 482, 490-491, applying the doctrine of estoppel as between landlord and tenant, or between vendor and vendee, all cited in appellant's brief and particularly relating to ejectment suits like the one at bar. That Court, as may be seen from its opinion, does not even mention Earl T. Ellis, Receiver of the Quantico Company, Incorporated, the appellant in the case; it treated the case as one

between the Receiver and the United States, rather than against the defendant as an individual; it disregarded the record showing that the said Company and the Congress, on behalf of the United States, had entered into a written contract of sale and purchase of said lands on July 1, 1918, and that said contract had not been completed by the President of the United States, as directed by Congress. That Court assumed for its basis of reasoning that said land had been acquired by the United States by "condemnation proceedings" when the record showed its purchase as aforesaid.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The reasons relied on for allowance of the writ are:

(a) The Court of Appeals for the Fourth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions. This case is one between citizens of different States, in the Federal District Court in Virginia, brought by petitioner against the respondent as an individual to recover possession of lands within its territorial jurisdiction, and, therefore, was a local action in that State. Under Erie R. Co. v. Tompkins, 304 U. S. 64, and Ruhlin v. N. Y. Life Insurance Co., ante, p. 202, the substantive laws of Virginia must be applied in matters relating to rights in land in that State in similar cases. Section 5451 of the Code of Virginia authorizes actions of ejectment; section 5455, specifies the person to be sued; section 5141, supra, provides that no land in Virginia shall be conveyed unless by deed or will; section 5516, supra, provides the mode by which a tenancy on land may be terminated by the parties landlord and tenant; and section 3813, supra, authorizes the Court to appoint a Receiver of a dissolved corporation of Virginia.

In Suttle v. R. F. & P. R. Co., 76 Va. 284, the Supreme Court of Appeals of Virginia, being the highest court in that State, declared the following principles of law: "The doctrine generally understood in Virginia is that in ejectment the plaintiff must show a legal title in himself, and a present right of possession under it at the commencement of the action. To this doctrine some exceptions exist, for instance, one in peaceable possession, and ousted by a stranger without title, may recover in ejectment on the strength of his mere previous possession, and a tenant is estopped to deny the title of his landlord." See also, Merriam v. Hoover, 107 Va. 485, 59 S. E. 483; Casselman v. Bialas, 112 Va. 57, 70 S. E. 479; Brunswick Land Corp. v. Perkson, 146 Va. 695.

The above laws of Virginia were not observed by the District Court below, nor by the Court of Appeals below, in connection with Rule 56 of the Federal Rules of Civil Procedure. It became the judicial duty of that Court, by that Rule invoked by petitioner's motion for summary judgment, to examine the pleadings, admissions on file, together with the affidavits and annexed documents in support thereof, there being no counter affidavits of the respondent, and then determine the question of whether there existed a genuine issue as to any material fact, and that the petitioner as the moving party was entitled to a judgment as a matter of law. But this judicial duty was not performed by that Court; it merely entered judgment denying the motion, adjudging that petitioner was not entitled to possession of the lands described in the complaint, and dismissed the action *ex mero motu* (R. 31-32).

And the Court of Appeals below sanctioned that sort of proceeding—a mockery of justice on its face, a deprivation of private property without due process of law, and a

departure from the first principles established in our system of jurisprudence for the protection of private rights.

(b) The Court of Appeals for the Fourth Circuit, sitting in this case on appeal, has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision. The whole opinion of that Court was based upon its mere assumption that the appeal, by the petitioner in the case, was taken from a judgment of the District Court below granting a motion of the respondent for summary judgment in his favor, when the notice of appeal itself showed otherwise (R. 32). The Court of Appeals, in its opinion, *failed* to mention petitioner's motion for summary judgment; *failed* to mention Rule 56 of the Federal Rules of Civil Procedure; *failed* to mention any one of the four questions presented for adjudication; *failed* to mention any one of the errors of the District Court below as presented by the record; *failed* to mention any one of the decisions of the Courts, 52 in number, cited to the Court by petitioner's brief; *failed* to mention Earl T. Ellis, Receiver of The Quantico Company, Incorporated, the appellant in the case; asserted that the "defendant made a motion for summary judgment" when the record showed that it was *not* argued by counsel (nor ripe for argument) and submitted to the trial Court for decision; asserted that the Court had "examined the original papers in the case and find the motion properly indorsed by the clerk as having been *filed* on May 18, 1949", when the date of its *filing* is wholly immaterial; asserted that the trial judge granted summary judgment on the motion of the defendant, when the record shows the contrary; asserted that "judicial notice" of the records of other proceedings was properly taken by the trial judge in the court below on the motion for summary

judgment, when Rule 56 of the Federal Rules of Civil Procedure does not authorize such "judicial notice;" disregarded the record showing the respondent's failure to file an affidavit in opposition to the petitioner's motion for summary judgment, pursuant to Rule 56 (e), supra, so as to bring into the case documents or records of other judicial proceedings of his own selection; asserted that the land involved was acquired by the United States under *condemnation proceedings* pursuant to the Act of July 1, 1918 (40 Stat. 704, 724, 738), when that Act, page 724, accepted the offer of the Quantico Company to sell and convey its land to the United States, and when that Act, at page 738, authorized condemnation of other lands not so purchased and specified at page 726 of the Act; and quoted 62 lines of matter found in the opinion of the District Court below in the case of United States v. Bruce McIntosh, trustee of the estate of Hugh B. Hutchinson, deceased, in an attempt to adjudicate the rights of the petitioner in the case at bar. Yet, the record in that case is not a part of the record in this case. Moreover, the record here shows that the Hutchinson lands, consisting of 3100 acres, had been purchased by the United States when it purchased the Quantico Company lands as aforesaid. Furthermore, such fact appears in the McIntosh Case in its first six findings of fact, except the last two paragraphs of finding (6). Such proceeding had no subject matter, and is *coram non judice* and void on its face.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fourth Circuit, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the Fourth Circuit entered in this cause on December 20, 1949, be reversed,

vacated and set aside; and that your petitioner be granted such other and further relief in the premises as may be proper.

JOHN LOCKE GREEN,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF THE PETITION

OPINIONS OF THE COURTS

No opinion was pronounced by the District Court below upon the matters presented by the record in the case. A memorandum opinion, bearing the signature of the District Judge Don Gilliam, was filed in that Court on July 16, 1949, *but relates wholly to matters outside the record—a motion not argued and submitted to the trial Court.* Petitioner was reluctant to have it printed because of the expense, but the Solicitor General refused to stipulate to omit its printing. It appears in the record, pages 25-31, but is not found among the reported decisions. The opinion, per curiam, pronounced by the Court of Appeals for the Fourth Circuit (Circuit Judges Parker, Soper, and Dobie), was filed December 20, 1949, and appears at pages 33-38 of the record. It is reported in 178 F. (2d) 791.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, section 1254 (1). The judgment of the Court of Appeals for the Fourth Circuit was entered December 20, 1949 (R. 39). Petition for rehearing was denied January 28, 1950 (R. 39). This petition for the writ of certiorari was filed April 10, 1950.

THE FACTS

The facts are stated in the petition under "Summary Statement of the Matters Involved", at pages 4-10.

SPECIFICATION OF ERRORS

The Court of Appeals for the Fourth Circuit erred:

1. In declaring in its opinion that this (appeal) is an appeal from a summary judgment for defendant in an action by the Receiver of the Quantico Company against Clifton B. Cates, Commanding General of the Marine Corps Base at Quantico, Virginia, and in entering its judgment based thereon.

2. In disregarding the record showing that no motion of the defendant for summary judgment was argued and submitted by his counsel to the District Court below for decision.

3. In asserting that the motion of defendant was filed in the action on May 18, 1949, when the date of its *filing* is immaterial.

4. In supplying evidence by way of judicial notice, in aid of the defendant Cates who presented no evidence.

5. In treating the case as if the United States were a party thereto, when the defendant was sued as an individual.

6. In disregarding the record showing that the defendant failed to bring into the case any facts or written documents, by affidavit in opposition to petitioner's motion for summary judgment in his favor, pursuant to Rule 56 (e) of the Federal Rules of Civil Procedure.

7. In asserting that the lands sued for in the action had been previously acquired by the United States in a suit to quiet title, citing the case of United States v. McIntosh, 57 F. 2d 573, and 2 F. Supp. 244, as evidence thereof.

8. In asserting that the lands thus sued for had been acquired by the United States by condemnation proceedings, pursuant to the Act of July 1, 1918 (40 Stat. 704, 724, 738).

9. In asserting that judicial notice of such suit to quiet title and condemnation proceedings was properly taken by the trial Court on the motion of the defendant for a summary judgment.

10. In quoting 62 lines of matter found in the decision in United States v. McIntosh, supra, and adopting the doctrine there announced by a district court, without jurisdiction, as an adjudication of the rights of petitioner in the case at bar.

11. In disregarding the motion of petitioner for a summary judgment, together with the pleadings, admissions on file, and affidavits and annexed documents in support thereof.

12. In disregarding Rule 56 of the Federal Rules of Civil Procedure, from which the District Court derived its procedure.

13. In disregarding the laws of Virginia, statutory and judicial, relating to actions of ejectment in that State.

14. In disregarding the law of estoppel as between landlord and tenant, vendor and vendee, in actions of ejectment.

15. In denying petitioner due process of law in the case.

16. In affirming the judgment of the District Court below.

PRELIMINARY ARGUMENT

Petitioner omits argument of all matters contained in the opinion bearing the signature of the trial judge in the District Court below, because it is exclusively devoted to a discussion of an alleged motion of respondent for summary judgment, which was not argued and submitted to that Court at its hearing on June 6, 1949 (R. 33). Hence, that opinion and its subject matter are not before this Court for review, although in the printed record; and to argue them would constitute a fraud upon this Court.

ARGUMENT

POINT 1.

A District Court of the United States, Sitting in Diversity of Citizenship Cases, after Hearing Plaintiff's Motion for Summary Judgment in His Favor, together with Individual Affidavits and Annexed Documents in Support Thereof, with a Copy Served upon the Defendant, under Rule 56 of the Federal Rules of Civil Procedure, where no Counter-Affidavit was Filed by the Defendant in Opposition Thereto as provided by the Rule (e), has No Lawful Authority to Deny such Motion for Summary Judgment, Without Assigning Grounds Therefor, and Adjudge that the Plaintiff was Not Entitled to Recover Possession of the Lands sued for, and Dismiss His Action with Costs to the Defendant, in the Absence of any Motion Therefor.

The above point applies to the action of the District Court below in adjudicating an important action of eject-

ment. That Court was governed by the procedure prescribed by Rule 56 of the Federal Rules of Civil Procedure, and the mandate of this Court in Erie R. Co. v. Tompkins, 304 U. S. 64, and no other procedure was permissible. Moreover, that Court had no power or jurisdiction to dismiss the action, in the absence of any motion therefor, *and its judgment of dismissal is void.* It is a fundamental principle of law that every Court remains passive until the exercise of its jurisdiction is invoked by the application of some person as litigant. "There must be some appropriate application invoking the judicial power of the Court in respect of the matter to be litigated." Freeman on Judgment (5th Ed.), section 338. In State ex rel. v. Muench, 217 Mo. 124, 138, 117 S. W. 25, the Supreme Court of Missouri said:

> "The courts cannot, *ex mero motu,* set themselves in motion, nor have they the power to decide questions except such as are presented by the parties by their pleadings. The parties, by their attorneys, make the record, and what is decided within the issue is res judicata; *anything beyond is coram non judice and void.*"

And further said (p. 141):

> "But if the chancellor, as we have held, reached out his arm too far and grasped a jurisdiction not within the issues, then that part of the decree outside the issues became *coram non judice and void.*"

POINT 2.

A District Court of the United States, when Sitting in Diversity of Citizenship cases and cases invoking Rule 56 of the Federal Rules of Civil Procedure, has no lawful authority to refuse to apply the law of the State in which it sits, whether declared by its Legislature in a statute or by its highest court in a decision in like cases, as an aid in determining the questions presented by a motion of a party for summary judgment in his favor.

This point applies to the action of the District Court below which failed to apply the substantive laws of Virginia, and also failed to observe the procedure prescribed by Rule 56 of the Federal Rules of Civil Procedure for the disposition of the case. In Ruhlin v. N. Y. Life Insurance Co., 304 U. S. 202, 208-209, this Court, after referring to Erie R. Co. v. Tompkins, 304 U. S. 64, held:

> "The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the State courts. * * * Now they must broaden their inquiry to include decisions in the State court."

POINT 3.

A Court of Appeals of the United States, sitting in cases like those described in the preceding questions (1) and (2), may not lawfully sanction the denial of such motion and refusal to apply such law, and then affirm the judgment of the district court therein.

This point applies to the Court of Appeals for the Fourth Circuit in giving sanction to the District Court's denial of the petitioner's motion for summary judgment, without assigning any grounds therefor, and its refusal to apply the law of Virginia, statutory and judicial, in connection with Rule 56 of the Federal Rules of Civil Procedure. Laws are to be respected by the Courts as well as individuals,

not to be disobeyed. Courts are created to administer justice under the laws, not to disregard them. No citations of authorities are necessary on this subject, save the following.

In Hovey v. Elliott, 167 U. S. 409, 413, this Court said:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. * * * A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, *and is not entitled to respect in any other tribunal.*" (Italics supplied.)

In Windsor v. McVeigh, 93 U. S. 274, 282, the Court held:

> "Though a court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot transcend the power conferred by the law."

Rule 56 (c) of the Rules of Civil Procedure is mandatory in terms, for it says:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

And this Court has said:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." Botany Worsted Mills v. United States, 278 U. S. 282.

POINT 4.

A Circuit Court of Appeals of the United States, while sitting on appeal in such cases, may not lawfully ignore the record as made by the parties in the cases in the lower court, ignore the procedure prescribed by Rule 56 of the Federal Rules of Civil Procedure, invoke the doctrine of judicial notice in such cases, ignore the rule of estoppel as between landlord and tenant, vendor and vendee, in actions of ejectment, supply facts and statutes found in other cases between other parties, base its opinion and judgment upon its assertion that an appeal had been taken from a summary judgment in favor of the defendant, where the notice of appeal and record showed the contrary fact, and then affirm the judgment against the plaintiff in the lower court.

The above point, in all its aspects, is applicable to the opinion and judgment of the Court of Appeals in this case, and requires no elaboration. That opinion recites matters far afield of that "due process of law" found in the Fifth Amendment to the Constitution, and of the first principles established in our system of jurisprudence for the security of private rights. That Court was unwilling to abide by the record as made by the parties and presented to that Court for review. That record shows that the respondent failed to respond to petitioner's request for admission of facts; failed to file any counter-affidavit in opposition to petitioner's motion for summary judgment, as authorized by Rule 56 (c) of the Federal Rules of Civil Procedure; failed to bring into the case any facts or written documents by affidavit, as authorized by Rule 56 (e), supra; failed to plead in his answer the record of any other judicial proceeding, or any part thereof; and failed to have his counsel argue and submit his motion for summary judgment to the District Court at its hearing on June 6, 1949. Thus the

respondent, by reason of his own default, estopped himself and his counsel from further participation in this case. Yet this record, which stands unassailable, was disregarded by the Court of Appeals as by its opinion appears. As an example, that Court exhibited its idea that this action of ejectment was between the petitioner and the United States, when the record shows otherwise. As a further example, that Court resorted to the doctrine of "judicial notice" in disregard of the procedure prescribed by Rule 56 (c), supra, and the laws of Virginia relating to actions of ejectment, then quoted in its opinion 62 lines of printed matter found in the opinion of the District Court below rendered in the case entitled "United States v. McIntosh, 2 F. Supp. 244," and then adopted them as binding upon the petitioner in the case at bar. And, after indulging in that procedure concluded thus: "The lands, which had been leased to the United States, had been subsequently acquired by the United States by *condemnation* proceedings pursuant to the Act of July 1, 1918, 40 Stat. 704, 724, 738". But the record fails to show any condemnation proceedings. Moreover, that Act, page 724, accepted the written offer of the Quantico Company to sell and convey its lands to the United States, and the respondent's answer to the petitioner's complaint contained the following admissions (R. 4): *"It is admitted that The Quantico Company, Incorporated, sold and that the United States purchased all of the lands described in the complaint."* This admission on the record *estopped* the District Court and the Court of Appeals below from resorting to "judicial notice" in an effort to establish in the United States the title to said lands by condemnation proceedings. Moreover, such procedure is not permitted by Rule 56 of the Federal Rules of Civil Procedure, nor sanctioned by any other law in this country. In Christianson v. Gaines, 174 F. (2d) 534, 536, the Court said:

"Rule 56, Federal Rules of Civil Procedure, 28 U. S. C. A., is utilized by litigants to secure justice without unnecessary expense and unnecessary delay. It imposes a duty upon the court to sift the issues in the case and to determine which material facts are really at issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting is quite similar to the pre-trial procedure provided in Rule 16, except that under Rule 56 (d) it is compulsory while under Rule 16 it is discretionary with the court. * * * Reading Rule 56 and Rule 8 (a) together, *it was the duty of the Court to determine whether or not there was a genuine issue of fact in controversy. If so, the parties were entitled to a trial and, if not, summary judgment was proper.*"

POINT 5.

The record shows that the petitioner was entitled to a summary judgment as a matter of law in the District Court.

This petitioner in his motion for summary judgment addressed the trial Court as follows (R. 7): "Plaintiff moves the Court as follows: 1. That it enter, pursuant to Rule 56 of the Federal Rule of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint, on the ground that the affirmative defenses set forth in defendant's answer are insufficient as a matter of law and that there is, therefore, no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law, or, in the alternative, 2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on this motion, by examining the pleadings, evidence, and admissions before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon

make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in this action as are just."

This motion was based upon the pleadings; the notice to the defendant to admit the truth of the facts requested by the plaintiff and served upon defendant, pursuant to Rule 36 (a) of the Federal Rules of Civil Procedure, and the admissions of fact resulting from the failure of the defendant to reply to said notice and request; two individual affidavits and annexed papers and documents in support thereof; and judicial knowledge of the Act of July 1, 1918, ch. 114, 40 Stat. 704, 724, as follows (R. 8):

> "Marine Barracks, Quantico, Virginia: The President is authorized to acquire under the authority and provisions of this Act all of the land specified in the report of the board appointed by the Major General Commandant, Marine Corps, dated January 25, 1918, at Quantico, Virginia, as a permanent Marine Corps post, and the sum of $475,000, or so much thereof as may be necessary, is hereby appropriated for this purpose."

A copy of the foregoing was promptly served upon the respondent but he has failed to file counter-affidavits.

The respondent's answer *admitted* the fact that The Quantico Company, Incorporated, on July 1, 1918, was the owner in fee and entitled to possession of the lands described in the complaint in the action; *admitted* that he had no interest in such lands; *admitted* that the United States had purchased them; *admitted* that the United States had occupied them for a short time under a lease dated July 1, 1918; but denied the averment in the complaint that the petitioner, as receiver and representative of said Company, was the owner in fee and entitled to possession of said lands on October 6, 1947. The respondent's

answer then asserted two defenses to the action, first, that the right of action did not accrue within 15 years before the commencement of the action, and, second, that the United States had acquired the title in fee to such lands by decree entered by the Court on January 17, 1933, in an alleged quiet title suit entitled "United States of America v. H. B. Gilliam and C. E. Ellis, Receiver of The Quantico Company, Incorporated, Equity No. 33." *No record of such proceeding, nor the decree therein, was pleaded by the respondent in his answer in the instant case* (R. 4-5).

Other Admitted Facts

The respondent, by failing to respond to petitioner's request for admissions of facts, *admitted the following facts* (R. 5-7): (a) The United States Marine Corps entered into possession of and occupied on July 1, 1918, the lands owned and leased by The Quantico Company, Incorporated, to the United States on July 1, 1918, and continued in possession thereof at all times thereafter; (c) the United States paid the sum of $6,000.00 to The Quantico Company in payment of the contract-rent for said leased lands for the months of July, August, September, and October, 1918; (d) the United States paid to the Quantico Company and Rudolph B. Behrend, Trustee, the sum of $269,477.00 on September 4, 1919, by check from the Navy Department on the funds of the United States, but nothing thereafter to said Company or its legal representatives; (e) the United States has never received from said Company any deed of conveyance of the lands described in the complaint; (f) the United States has never served any notice in writing upon the Quantico Company, or its legal representatives, of an intention to terminate the lease of said lands; (g) on about November 4, 1918, the United States Marine entered into possession of and occupied other land of the Quantico Company, without its permission, and continued in pos-

session thereof at all times thereafter; (i) the defendant has no right, title, or interest in any of the lands described in the complaint; and (j) the defendant's authority for entering upon and exercising control over the lands involved in this action, on October 7, 1947, and until the commencement of said action on December 18, 1947, is founded on an order in writing received by him from the United States.

Other Facts Proved by Affidavits

The two affidavits in support of the motion were made by Earl T. Ellis, the petitioner, and Edmond C. Fletcher, an attorney for petitioner and his predecessors, H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated, since April 15, 1931. These affidavits on their face asserted that they were made on personal knowledge of the affiants and that they were competent to testify to the facts set forth therein, as required by Rule 56 (e) of the Federal Rules of Civil Procedure. The affidavit of Earl T. Ellis contained testimony that he was a citizen of the State of Virginia as alleged in the complaint; it also contained a certified copy of a decree of the Hustings Court of the City of Petersburg, Virginia, dated October 4, 1947, appointing him as the successor Receiver of The Quantico Company, with authority to institute and prosecute this action (R. 9-12).

The affidavit of Edmond C. Fletcher (R. 12-13) contained testimony as to his personal knowledge of the affairs of said Company since April 15, 1931; it contained a certified copy of his warrant of attorney (R. 15); and a certified copy of the order of the Corporation Commission of Virginia, dated July 10, 1919, showing the creation of said Company as a corporation on February 2, 1916, and its dissolution on May 31, 1919 (R. 13-15); it contained a certified copy of the hearings before a subcommittee of the

Committee on Naval Affairs, United States Senate, on May 6, 1918, on the subject of purchase of land for Marine Barracks, Quantico, Virginia (R. 19-20). This document shows that the Quantico Company submitted a written offer dated May 6, 1918, to sell and convey its lands to the United States for a consideration of $375,000.00 (R. 20); that said offer was approved by the Secretary of the Navy at such hearing and inserted in the record in that proceeding. In United States v. Purcell Envelope Co., 249 U. S. 313, 319, this Court declared:

> "It makes no difference that the contract was not formally approved. * * * The formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as we have decided in the Garfielde Case, by the acceptance of the bid of the Envelope Company and the entry of the order awarding the contract."

Article 1, sec. 8, clause 18, of the Constitution gives Congress the power to enter into contracts on behalf of the United States.

This affidavit also contained testimony that the affiant (R. 12-13), on behalf of H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated, executed and delivered to the President of the United States, Chief Executive Officer of the United States, a notice in writing dated June 24, 1946, terminating a contract of lease to become effective on July 31, 1946, which lease had been executed and entered into on July 1, 1918, by the Quantico Company, as lessor, and by the United States as lessee, covering the lands described under the "First Parcel" and "Second Parcel" in the complaint; and that a duplicate copy of the notice, with the President's receipt of same on June 25, 1946 (R. 16A-16B) is annexed to the affidavit and marked Exhibit B (R. 17-19).

None of the foregoing evidence was controverted on the record by the respondent. As before stated, he has failed to file any counter-affidavits in opposition to petitioners motion for summary judgment in his favor and has failed to have his counsel argue and submit his motion for summary judgment to the District Court below for decision. Thus, he thereby estopped himself and his counsel from further participation in this case; and it is too late now to do so in this Court. Moreover, since the record shows that the United States has not restored the possession of the lands in controversy to the petitioner as Receiver of the Quantico Company, the respondent who asserts no title thereto in himself, is *absolutely estopped from controverting the title of petitioner to said lands, or asserting any title thereto in the United States.* Hence, there appears no genuine issue of fact to be tried by a jury, no defenses to the action of ejectment, and that the petitioner is entitled to a judgment as a matter of law. The authorities on the subject of estoppel in actions of ejectment are numerous. A few of them are:

2 Greenleaf on Evidence (16th Ed.), sections 305, 306, 311, 315, 319, 321, 322;
Greenleaf's Lessee v. Birth, 6 Pet. 302, 311;
Christy v. Scott, 14 How. 282, 292;
Burnett v. Caldwell, 9 Wall. 290, 293;
Lewis v. Hawkins, 23 Wall. 119, 125;
Emerick v. Tavener, 9 Grat. (50 Va.), pages 220, 223-4;
Bernard v. McClanahan, 115 Va. 453, 458, 79 S. E. 1059-60;
Suttle v. R. F. & P. R. R. Co., 76 Va. 284, 289;
18 Am. Jur., sections 29-31, pp. 31-32;
Chavez v. Bergere, 231 U. S. 482, 490-491.

In Chavez v. Bergere, supra, this Court said:

"In short, the defendant acquired possession as conditional vendee of Otero, and so are estopped from call-

ing his title in question. As said in Tyler on Ejectment (p. 543): 'There is a class of cases in which the defendant is not permitted to controvert the title of the claimant in an action of ejectment on the ground of *estoppel.* These are cases where a privity exists between the defendant and the plaintiff, or those from whom he derives title. If a privity in estate has subsisted between the parties, proof of title is ordinarily unnecessary on the part of the plaintiff, for the reason that a party is not permitted to dispute the title of him by whom he was let into possession. In all these cases, the proof is directed to the question as to whether such a relation exists between the parties so as to operate as an estoppel, and thereby supersede the necessity of introducing vidence to establish the title of the claimant.

And again (p. 559): 'Although strictly speaking, the relation of landlord and tenant is not created between vendor and vendee; yet the vendee in an action of ejectment by the owner against him, is *absolutely estopped, from either showing title in himself, or setting up an outstanding title in another; and the same rule applies to one coming into possession under the vendee, either by his consent, or as an intruder.*'" (Italics supplied).

And Mr. Greenleaf said: "Even an agreement to purchase lands, if made deliberately, estops the purchaser from denying the title of the vendor." 2 Greenleaf on Evidence (16th Ed), section 305. In Emerick v. Tavener, supra, 9 Grat. (50), pages 220, 223, 224, the Virginia Supreme Court of Appeals said:

"A tenant cannot be permitted to question or impugn the title of his landlord during the continuance of the tenancy, *nor until he has restored the possession* or done what would be regarded as the equivalent; nor can he be permitted to deny that the possession so received was the possession of the landlord. And the rule is extended to the case of a tenant acquiring pos-

session by wrong against the owner; and to one holding over after the expiration of the lease; and it applies whether the question arises directly in an action brought against the tenant to recover the possession, or in a collateral form in some other action. * * *

When once the relation of landlord and tenant is established by the acts of the parties, it attaches to all who may succeed to the possession through or under the tenant, whether immediately or remotely, the succeeding tenant being as much bound by the acts and admissions of his predecessor as if they were his own." (Italics supplied).

In Suttle v. R. F. & P. R. R. Co., 76 Va. 284, 289, the Supreme Court of Appeals of Virginia further held:

"This court also held, in Lee v. Tapscott, 2 Wash. 276, that a person in peaceable possession of land, who is entered upon and ousted by a stranger without title, may recover in ejectment upon the strength of his mere previous possession. * * * And so, generally, a tenant, let into possession under a lease, is estopped to deny the title of his landlord, *and this estoppel may be relied on in ejectment.*"

CONCLUSION

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that it may finally adjudicate the rights of the litigants herein, and that to that end a writ of certiorari should be granted so that this Court may review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, and finally reverse it.

Respectfully submitted,

JOHN LOCKE GREEN,
Counsel for Petitioner.

April, 1950.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 739

EARL T. ELLIS, RECEIVER OF THE QUANTICO COMPANY, INCORPORATED,

Petitioner,

vs.

CLIFTON B. CATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner, in this reply brief, calls the Court's attention to the brief filed herein by the Solicitor General and three associates, without showing themselves by signatures to be the attorneys for the respondent in this case. Petitioner, assuming that the Court will overlook this omission and admit the brief as that of the respondent, now calls the Court's attention to its contents, form, errors, and

other omissions. Respondent's brief fails to deny the accuracy of or challenge any part of the summary statement of the matter involved, as set forth in petitioner's petition for writ of certiorari, and incorporated in his brief as facts by reference, and likewise failed to respond to the Questions Presented, as set forth in the petition for such writ, and severally discussed in petitioner's brief. The respondent, therefore, admits the truth of petitioner's statements. In 3 Corpus Juris, section 1620, p. 1446, the author said:

> "It is also a principle of general application under rules of court regulating briefs that statements in appellant's brief, which the rules provide what it shall contain, will be taken as true, unless controverted in appellee's brief. It is so held in respect to statements of the evidence, or such parts of the record as are claimed to present the errors relied on for reversal."

Rule 38 (2) of the Rules of this Court contains the following: "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." This Rule was disregarded by counsel for respondent, whose brief sets forth "Questions Presented," four in number, relating to matters not appearing in the record of this case. And Rule 27 (4) of this Court provides: "The counsel for an appellee or respondent shall file with the clerk forty copies of his brief * * * such brief to be of like character with that required of the other party, *except* that no specification of errors need be given, and *that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side.*" Yet the respondent's brief, without challenging the accuracy of petitioner's brief, sets forth "Statutes Involved," followed by 28 lines of the Act of Congress of July 1, 1918, 40 Stat. 738, which had no relation to the record, also his own restricted and erroneous

"Statement," with marginal foot notes, and then a long argument in his brief, pages 7-13, of his own prepared subject matter, rather than to respond to that set forth in the brief of petitioner, including Rule 56 of the Federal Rules of Civil Procedure, and 22 citations of legal authorities.

Respondent's Other Errors

1. In respondent's brief, page 6, appears the following: "On October 12, 1948, petitioner filed a motion for summary judgment, accompanied by supporting affidavits (R. 7-8). Likewise, on May 18, 1949, respondent filed a motion for summary judgment of dismissal with supporting affidavit (R. 21-22). *Hearing was had on both motions on June 6, 1949.* These words, in italics, are followed by a foot note (3) reading as follows: "Petitioner's repeated reference (Pet. 2, 9, 18) to the *absence* of any motion by the defendant (respondent) is beyond comprehension." The record itself shows that respondent's motion for summary judgment *was not so heard;* it (R. 33) tells the story in these words: "Docket Entries. June 6, 1949. *Trial Proceedings:* George R. Humrickhouse, U. S. Attorney; John Locke Green, Attorney for Plaintiff. This cause came on to be heard on motion for summary judgment in behalf of plaintiff. Motion by plaintiff to strike defendant's motion for summary judgment. Court directs counsel to submit memorandum as to issue within three weeks." The foregoing entries are the words of the Clerk of the trial Court, and they ought not to have been disregarded by counsel for respondent here. Moreover, the petitioner's brief, at the bottom of page 7, contains the following: "On June 3, 1949, petitioner filed therein a motion to strike from the record a motion of respondent, filed May 18, 1949, for summary judgment in his favor (R. 7-20). These two motions of petitioner, *and none by the respondent,* were argued and

submitted to the District Court below (Judge Don Gilliam sitting specially) at its hearing on June 6, 1949, as appears by docket entry of the Clerk of the Court (R. 33)." And the same, in substance, was restated in petitioner's petition for writ of certiorari, pages 8, 12, and in his brief, pages 16, 18, 19, and 20. It is, indeed, beyond the comprehension of the petitioner to observe the respondent's lack of understanding of the record in this case.

2. Respondent in his brief, page 6, said: "As appears from the district court's opinion, this dismissal was based upon the propositions that title to the lands is in the United States, the issue of title and possession is *res judicata*, the action is barred by limitations, and on the fact that respondent is no longer in possession." Here, again, the respondent misinterprets the recorded opinion, to which he refers. In the very first part of that opinion (R. 26) the words of the district judge appear thus: "Each party *filed* a motion for summary judgment and a hearing was had at Alexandria, Virginia, on June 6, 1949." A hearing was had on what? The answer is in the record as made by the Clerk (R. 33).

3. Respondent's brief, page 7, under the head of "ARGUMENT," contains the following: "As appears from the decisions of both courts below (R. 25-31, 33-38), the decision below was based on the facts of record in this case and on facts and records in two previous cases in the district court, *of which facts and records that court took judicial notice.* These latter cases are *United States* v. *H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated,* Equity No. 33 in the district court, and *United States* v. *McIntosh,* 2 F. Supp. 244 (1932)." The reported decision in the latter case includes the *Gilliam* and *Ellis* case (2 F. Supp. at p. 250)." Again, the respondent avoids the record which shows that this case is bottomed

on Rule 56 of the Federal Rules of Civil Procedure, plus the substantive laws of Virginia relating to actions in ejectment, and such Rule and laws do not authorize a district court to take judicial notice of anything, or of other proceedings in that Court. Moreover, the record here shows that respondent failed in his answer to plead the record of any other proceeding, or any part thereof (R. 4-5). Furthermore, respondent, by his failure to file in this case any affidavit in opposition to the motion of petitioner for summary judgment, as authorized by Rule 56 (c) of the Federal Rules of Civil Procedure, thereby lost his right to present evidence before the trial court—and "judicial notice" is a species of evidence. The petitioner, notwithstanding that no record of any other proceeding was before the district court on June 6, 1949, wishes to show to this Court that the said case of *United States* v. *H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated,* Equity No. 33," as lodged in that district court in October, 1931, was *coram non judice* and void. The record here shows that the Hustings or Corporation Court of the City of Petersburg, Virginia, on April 8, 1931, appointed H. B. Gilliam and C. E. Ellis, Receivers of The Quantico Company, Incorporated, to take charge of all of the property of that Company (R. 10-12). Hence, these parties were officers of that court and in charge of the lands then occupied by the United States, as a lessee from that Company. In *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38, 54, this Court said:

> "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The latter courts, though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while in the custody of the court which seized it."

See also the following to the same effect:

Wiswall v. *Sampson,* 14 How. 52.
Peale v. *Phipps,* 14 How. 368.
Barbour v. *Barbour,* 104 U. S. 176.
Porter v. *Sabin,* 149 U. S. 473.
Palmer v. *Texas,* 212 U. S. 125.
Reed v. *Axtel, etc.,* 84 Va. 231.

The proceedings are also void for want of jurisdiction of the subject-matter, because the United States had no legal title to the lands involved. *Frost* v. *Spitley,* 121 U. S. 552, 556; *Dick* v. *Foraker,* 155 U. S. 404, 415.

4. Respondent's brief, page 8, contains the following solemn assertion by his counsel: "On November 4, 1918, the President issued a proclamation (40 Stat. (Pt. 2) 1874, 1880-1884) taking title for the United States to the lands belonging to the Quantico Company here involved and others. It is clear that title vested in the United States by force of the statute and the proclamation. *United States* v. *McIntosh,* 2 F. Supp. 244, 249, 250-251." But the lands lie in Virginia, and the laws of that State do not recognize "proclamations" of the President of the United States as a mode for acquiring for the United States the title to privately owned lands. Moreover, the laws of Virginia provide how the title to land, in that State, shall be transferred, viz. by deed or will, *Langdon* v. *Sherwood,* 124 U. S. 74, 81. *In United States* v. *Fox,* 94 U. S. 315, 321, this Court said: "The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are matters not placed under the control of the Federal Government." Moreover, the proclamation of Woodrow Wilson as President was issued at the suggestion of the Acting Secretary of the Navy, and not by authority of the Act of Congress of July 1, 1918, chapter 114, 40

Stat. 704, or any other law. Consequently, such act of the President was not the act of the Government of the United States. *Hooe* v. *United States,* 218 U. S. 322, 334, 336. Such is not due process of law, as defined by this Court in *Hagar* v. *Reclamation District,* 111 U. S. 701. That document is void on its face. And now, observe what was said by Judge Chesnut, sitting in the case of *United States* v. *McIntosh, supra,* at page 252:

> "With respect to the Presidential proclamation, it is contended that no provision is made therefor in the Act; but this is unimportant because the President is fully authorized by the Act to take over the lands without limitation as to the method to be pursued."

It has no precedent in the history of jurisprudence in this country.

5. Respondent's brief, page 10, recites the following: "The contention is based upon the fact that the Government on July 1, 1918, entered into possession of part of the lands under a lease. But that lease was to run until June 30, 1919, 'or until such time as the United States takes possession of said tract of land under authority of and with a view to the purchase thereof.' *This lease was of course terminated by the Act of the President on November 4, 1918, in taking possession and title for the United States under the authorizing statute.*" This declaration, in italics, constitutes a new and strange idea or method for terminating a contract of lease on lands. But, the lands lie in Virginia, and Section 5516 of the Code of Virginia provides the mode by which a tenancy on land may be terminated by the landlord and tenant, and such does not authorize the issuance of a presidential proclamation.

6. Respondent's brief, page 12, contains the following: "Although respondent was in possession of the property

here involved as agent of the Government when this action was filed, he ceased to be in possession as of May 17, 1949, before the case was decided (R. 22). Consequently, he has not been withholding possession of the property from anyone since that date." There is no evidence, in the record, that respondent has abandoned the possession of the lands sued for, except by an unauthorized affidavit of George R. Humrickhouse (R. 22). But, whether such affidavit is good or bad, it makes no difference in law. The suit is not abated by his absence from the premises.

18 Am. Jur., sec. 142, p. 113.

Oetgen v. *Ross,* 47 Ill. 142.

Harrod v. *Burke,* 76 Kan. 909.

Conclusion

The foregoing justifies this Court in disregarding the brief of the respondent.

Respectfully submitted,

JOHN LOCKE GREEN,
Counsel for Petitioner.

(8196)

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 739

EARL T. ELLIS, RECEIVER OF THE QUANTICO COMPANY, INCORPORATED, PETITIONER

v.

CLIFTON B. CATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 25-31) is reported at 88 F. Supp. 19. The opinion of the court of appeals (R. 33-38) is reported at 178 F. 2d 791.

JURISDICTION

The judgment of the court of appeals was filed on December 20, 1949 (R. 39). A petition for rehearing was filed on January 17, 1950, and denied

on January 28, 1950 (R. 39-40). The petition for certiorari was filed on April 8, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the receiver of the former corporate owner of real property may, in a suit against the Government officer occupying the property, recover its possession when title thereto has vested in the United States by Presidential Proclamation issued in 1918 under specific authorization of Congress and, following the procedure established by Congress, just compensation was paid to the corporate owner.

2. Whether a decree entered in a suit brought by the United States against predecessor receivers of such company adjudging that title to the lands in question is in the United States and enjoining such predecessors from instituting any proceedings designed or intended to disturb the possession of such lands by the United States or its officers is *res judicata* of this suit.

3. Whether this action, filed almost thirty years after the Presidential Proclamation, is barred by the fifteen years' limitation established by Virginia law on suits to recover possession of land.

4. Whether the suit abates when it appears that the sole defendant is no longer in possession of the land.

STATUTE INVOLVED

The pertinent provisions of the Act of July 1, 1918, 40 Stat. 704, provide as follows:

> The President is authorized to acquire under the authority and provisions of this Act all of the land specified in the report of the board appointed by the Major General Commandant, Marine Corps, dated January twenty-fifth, nineteen hundred and eighteen, at Quantico, Virginia, as a permanent Marine Corps post, and the sum of $475,000, or so much thereof as may be necessary, is hereby appropriated for this purpose. [40 Stat. 724.]
>
> * * * * *
>
> The President is hereby authorized and empowered, within the amounts herein appropriated therefor, to take over immediately for the United States possession of and title to each and all of the parcels of land, including appurtenances and improvements for the acquisition of which authority is herein granted and for which appropriations are herein made: *Provided,* That if said lands and appurtenances and improvements shall be taken over as aforesaid, the United States shall make just compensation therefor, to be determined by the President, and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as added to said

seventy-five per centum will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, section one hundred and forty-five, of the Judicial Code: *Provided further,* That upon the taking over of said property by the President as aforesaid the title to all property so taken over shall immediately vest in the United States. [40 Stat. 738.]

STATEMENT

On December 18, 1947, this action was instituted by petitioner, as Receiver of The Quantico Company, Incorporated, to recover possession of certain lands forming part of the United States Marine Corps Base at Quantico, Virginia. The complaint alleged in substance as follows (R. 1-3): That The Quantico Company on July 1, 1918, was owner in fee of the lands in question and that appellant, the Company's Receiver, was similarly possessed on October 6, 1947 (complaint, par. 3); that on May 6 and July 1, 1918, Quantico Company and the United States entered into a contract by which the lands were sold to the United States for $375,000.00, but that the United States did not make payment of the purchase price and never received a deed to the lands from Quantico Company (complaint, par. 4); that certain of the lands were occupied by the United States from July 1, 1918, until June 30, 1946, under a lease from Quantico dated July 1, 1918, and that said lease was terminated as of June 30, 1946, by notice from

Quantico Company to the President of the United States (complaint, par 5); that the defendant on October 7, 1947, wrongfully entered into possession of the lands and continues to withhold possession (complaint, par. 6). The prayer is for possession and costs.

On February 6, 1948, respondent filed his answer (R. 3-5). That answer may be summarized thus: Ownership of and possession of the lands by Quantico Company on July 1, 1918, was admitted; it was alleged that the lands are owned in fee by the United States;[1] it was admitted that Quantico Company sold and the United States purchased the lands; it was also admitted that the United States occupied the lands for a short time under a lease dated July 1, 1918, and all other allegations of the complaint touching the lands in question were denied. The answer further interposed as defenses the statute of limitations, that respondent is no longer in possession of the lands and has no interest therein, and the defense of *res judicata,* and asked for dismissal of the complaint.

On September 3, 1948, petitioner filed a request for admission of certain facts (R. 5-6). No response was filed to this request for admissions, and

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[1] Petitioner's statement (Pet. 6, repeated at Pet. 26) that the answer alleged that the Government's title was acquired by virtue of the decree entered in 1933 in a suit between the United States and petitioner's predecessor is inaccurate. That judicial proceeding and the decree therein entered was not relied upon as the source of title, but as *res judicata* on the title issue. (Ans. Fifth Defense, R. 4-5.)

under Rule 36, Federal Rules of Civil Procedure, they stand admitted.[2]

On October 12, 1948, petitioner filed a motion for summary judgment, accompanied by supporting affidavits (R. 7-8). Likewise, on May 18, 1949, respondent filed a motion for summary judgment of dismissal with supporting affidavit (R. 21-22). Hearing was had on both motions on June 6, 1949.[3] On July 16, 1949, the district court filed its opinion (R. 25-31), and on July 20, 1949, entered its judgment granting respondent's motion (R. 31-32). As appears from the district court's opinion, this dismissal was based upon the propositions that title to the lands is in the United States, the issue of title and possession is *res judicata,* the action is barred by limitations, and on the fact that respondent is no longer in possession.

The court of appeals affirmed. In its per curiam opinion the court sustained the judgment on all four grounds upon which the trial court based its dismissal of the action.[4]

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[2] The immateriality of most of these facts is later shown (pp. 10-11, *infra*).

[3] Petitioner's repeated reference (Pet. 2, 9, 18) to the *absence* of any motion by the defendant (respondent) is beyond comprehension. The same position was taken and expressly rejected by the court of appeals (R. 36-37), and as above noted the motion appears at R. 21-22.

[4] While the court of appeals dealt primarily with the questions of title and *res judicata,* and did not specifically discuss the grounds of limitations and abatement, it did adopt the trial court's "comprehensive opinion, to which nothing need be added, as we are in complete accord with the reasoning and conclusions therein expressed" (R. 37).

ARGUMENT

As appears from the decisions of both courts below (R. 25-31, 33-38), the decision below was based on the facts of record in this case and on facts and records in two previous cases in the district court, of which facts and records that court took judicial notice. These latter cases are *United States* v. *H. B. Gilliam and C. E. Ellis, Receivers of the Quantico Company, Incorporated,* Equity No. 33 in the district court, and *United States* v. *McIntosh,* 2 F. Supp. 244 (1932).[5] The reported decision in the latter case includes the *Gilliam and Ellis* case (2 F. Supp. at p. 250) and two other cases. The four cases there decided arose in this way. Four former owners of lands now constituting the United States Marine Base at Quantico, Virginia, including the Quantico Company by its receivers, instituted suits in ejectment against Government officers in possession. The United States thereupon sued each of the former owners in the same district court which decided the instant suit to enjoin prosecution of the ejectment suits and to quiet its title, and decrees were entered granting such relief. The facts there established demonstrate the utter lack of merit in petitioner's case.

1. As held by both courts below, the United States has title to the property. The Act of July 1, 1918, 40 Stat. 704, 724, 738 (*supra,* pp. 3-4) au-

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[5] Petitioner as Receiver is the successor of Gilliam and Ellis (Petitioner's Ex. A, R. 10-11).

thorized the President to acquire certain lands, including those here involved, as a permanent Marine Corps post, and appropriated $475,000 "or so much thereof as may be necessary" for this purpose. The Act further provided that the President could take over possession of and title to such lands for the United States, and that "the title to all property so taken over shall immediately vest in the United States." Provision was also made for the President initially to determine just compensation, and the owner was free to accept such compensation, or in the alternative to take 75% of that amount and sue in the Court of Claims for the difference between such 75% and just compensation as determined by that court.

On November 4, 1918, the President issued a proclamation (40 Stat. (Pt. 2) 1874, 1880-1884) taking title for the United States to the lands belonging to the Quantico Company here involved and others. It is clear that title vested in the United States by force of the statute and the proclamation. *United States* v. *McIntosh,* 2 F. Supp. 244, 249, 250-251 (1932). Since both the statute and the proclamation are subject to judicial notice, the correctness of the finding of the courts below that title is in the United States is established independently of the prior litigation between the parties. The Quantico Company thereafter had only a claim for compensation as provided by the statute. If that claim was not satisfactorily met, the remedy was not by

ejectment but by suit against the Government as provided in the Act. Title being in the United States, petitioner is not entitled to possession. *Mcguire* v. *Elount,* 199 U. S. 142, 144, 147 (1905).

Petitioner does not question the fact that the lands in suit were covered by the statute and the proclamation. His case is pitched on the false notion that the 1918 statute constituted a "legislative contract" to pay the Quantico Company $375,000.00 for the property and that this amount has not been paid. (complaint, par. 4, R. 2; Pet. 5, 28.) Even if that were true, it would affect only the amount of just compensation due Quantico Company. Title would nevertheless have vested in the Government and this suit would, therefore, fail. But clearly there was no such contract. Quantico Company offered to sell the lands for that amount (R. 20). But the 1918 Act (*supra,* pp. 3-4) did not constitute an acceptance of that offer. As already shown, the amount to be paid was to be fixed by the President or, at the option of the landowner, by the Court of Claims. And, as appears from the opinion in *United States* v. *McIntosh,* 2 F. Supp. 244, 250, quoted by the court of appeals (R. 35), Quantico Company and two other former owners accepted the amounts fixed by the President. The amount so fixed and accepted by Quantico Company was $269,477.00 paid on September 4, 1919 (admission of fact (d), R. 6).

Petitioner's claim (Pet. 9) that the decision below conflicts with decisions of the Virginia courts and of this Court announcing the principle of estoppel of a tenant to deny his landlord's title is without foundation. The contention is based upon the fact that the Government on July 1, 1918, entered into possession of part of the lands under a lease. But that lease was to run until June 30, 1919, "or until such time as the United States takes possession of said tract of land under authority of and with a view to the purchase thereof" (R. 18). The lease was of course terminated by the Act of the President on November 4, 1918, in taking possession and title for the United States under the authorizing statute. Thus, as the court of appeals stated (R. 38), "the rule of law relied on manifestly has no application to a case where, as here, the lessee has in the meantime acquired title from the lessor."

Petitioner repeatedly refers (Pet. 6-7, 22, 25, 26) to certain admissions of fact made by respondent. Although petitioner's position based upon such admissions is not made clear, it may be assumed that he argues, as he did in the court of appeals, that such admissions recognize title to be in petitioner. These admissions (R. 5-6) clearly cannot be so interpreted. Paragraph 3 of respondent's Second Defense alleged that the land was owned in fee simple by the United States (R. 4). As already shown, that title was acquired on No-

vember 4, 1918. The facts that Quantico Company had owned the lands on July 1, 1918, that part of the lands had been first occupied by the Government under a lease, that rental for a period preceding acquisition of title had been paid by the Government, and that no deed ever passed from Quantico Company to the Government, have no tendency to deny or qualify the title acquired pursuant to the statute.

2. The question of title is *res judicata.* In *United States* v. *H. B. Gilliam and C. E. Ellis, Receivers of the Quantico Company, Incorporated,* Equity No. 33 in the district court below, reported in *United States* v. *McIntosh,* 2 F. Supp. 244 (1932), the United States secured a decree quieting its title to the lands here involved as against petitioner's predecessors and enjoining them from bringing any future action designed to disturb the possession of the Government or its agents. That decree certainly binds petitioner as successor receiver, and it inures to the benefit of those in privity with the United States, i.e., its officers in possession. As the opinions of both courts below make clear (R. 28-29; R. 38), there was unquestioned jurisdiction, and petitioner offers no apparent reason why the decree is not *res judicata* on the question of title.

3. The action is barred by limitations. Section 5805 of the Virginia Code bars an action for

recovery of land brought more than fifteen years after the accrual of the right of action. As pointed out by the district court (R. 29-30) it has been clear to The Quantico Company and its Receivers since November 4, 1918, the date the President took title to and possession of these lands for the United States, that the Government claimed the lands adversely. And certainly no question on this point could exist after May 27, 1931, when the Government instituted the action to quiet its title against petitioner's predecessors, resulting in a decree in the Government's favor. In these circumstances the ruling of the district court that the action was barred by limitations, concurred in by the court of appeals, was clearly correct.

4. Dismissal of the action on the ground of abatement was proper. Although respondent was in possession of the property here involved as agent of the Government when this action was filed, he ceased to be in possession as of May 17, 1949, before the case was decided (R. 22). Consequently, he has not been withholding possession of the property from anyone since that date.

From the foregoing it is clear that, contrary to petitioner's contentions, the granting of summary judgment in this case was eminently proper.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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MAY 1950.

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